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In the Supreme Court of the United States

OCTOBER TERM, 1953

AMERICAN BOTTLING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AMERICAN BOTTLING COMPANY, petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on June 30, 1953, which enforced an order issued by the National Labor Relations Board against Petitioner.

OPINIONS BELOW

The *per curiam* decision of the court below (R.I, 238),[1] is reported at 205 F. 2d 421. The decision and

[1] The printed record consists of three volumes, the first entitled Transcript of Record, containing, *inter alia*, the pleadings, Intermediate Report, Exceptions and Decision and Order of the Board; the second entitled Petitioner's Appendix, and the third entitled Respondent's Appendix. The proceedings in the court below have been appended to

order of the National Labor Relations Board (R.I, 153-231), issued May 28, 1952, is reported at 99 N.L.R.B. 345.

JURISDICTION

The judgment of the court below was entered on June 30, 1953 (R.I, 238). A petition for rehearing, filed by petitioner on July 22, 1953 (R.I, 239-242), was denied on August 13, 1953 (R.I, 243). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1251 (1) and under Sec. 10 (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the business of an independently owned and operated local bottler of a nationally advertised soft drink affects interstate commerce within the meaning of the National Labor Relations Act, where all of the bottler's sales are made within the state of its location; where its out-of-state purchases are concededly irrelevant to assertion of jurisdiction under the announced policy of the National Labor

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the first volume. In this petition references to the Transcript of Record are designated "R.I," references to Petitioner's Appendix are designated "R.II," and references to Respondent's Appendix are designated "R.III." Whenever in a series of references a semi-colon appears, references preceding the semi-colon are to findings of the Board or the court below; succeeding references are to the pertinent evidence. These references are to conform to the record below in which the Board was petitioner, and the petitioner here was respondent.

Relations Board,[2] and where the syrup which, with carbonated water, forms the bottler's product is manufactured within the state and delivered to the bottler in an intra-state transaction.

STATUTES INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29, U.S.C., Supp. V, 151 *et seq.*) are printed in the Appendix. (Section 2(2); 2(6), 2(7), 8(a)(1), 10(a))

STATEMENT

I. The undisputed commerce facts

Petitioner is an independent Texas corporation, wholly owned by Texas residents (R.III, 26, 27, 103). It operates a plant in Corpus Christi, Texas, where it is engaged in manufacturing and bottling a nationally advertised soft drink, Coca Cola (R.II, 118-126). Petitioner distributes the beverages it

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[2] A part of petitioner's annual purchases of bottles, caps and coolers, valued at $125,000, is made outside of Texas (R.I, 177). No such purchases are from the Coca Cola Company (R.III, 26). However, in asserting jurisdiction over petitioner, the Board placed no reliance upon these out-of-state purchases since, under the Board's publicly announced jurisdictional policy, it refuses to assert jurisdiction on the ground of "Imports" or "Inflow" alone unless such imports are valued in excess of $500,000. See *Federal Dairy, Inc.*, 91 N.L.R.B. 638, and N.L.R.B. *Sixteenth Annual Report*, pp. 15-39. Thus, in its Brief in the court below, the Board conceded that petitioner "did not meet the inflow test of the Board's jurisdictional 'yardstick'" (Br. p. 2).

bottles in several Texas Counties surrounding Corpus Christi (R.II, 119). All of petitioner's sales are made locally in Texas (R. II, 3).

The principal ingredient used by petitioner in manufacturing Coca Cola is Coca Cola syrup. This syrup is made by The Coca Cola Company, a Delaware Corporation, at its plant at Dallas, Texas (R.III, 2, 41). Petitioner, however, does not purchase its syrup (or any other item) from The Coca Cola Company (R. III, 26, 101). It obtains the syrup from Coca Cola Bottling Co. 1903, a Tennessee Corporation with its principal office and place of business at Dallas, Texas. Coca Cola Bottling Co. 1903 purchases Coca Cola syrup from the Dallas plant of The Coca Cola Company and delivers such syrup from the Dallas plant to petitioner at Corpus Christi. All of the syrup utilized by petitioner is manufactured in Texas (R.III, 41-42).[3] There is no evidence that any of the ingredients utilized by The Coca Cola Company at its Dallas, Texas plant in the manufacture of the syrup originate outside of the State of Texas.

The Coca Cola Company manufacturers Coca Cola syrup at various plants throughout the United States, one of which is the plant at Dallas, Texas (R.III, 41). The Coca Cola Company sells the syrup thus manufactured to distributing companies, such as Coca Cola Bottling Co. 1903 (R.III, 41-42). There are six such distributing companies in the United States, each of which is given the exclusive right,

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[3] The Trial Examiner did not mention this undisputed fact in his Intermediate Report. Petitioner specifically excepted to his failure to make this finding (R.I, 116).

within a designated area, to purchase syrup from The Coca Cola Company and resell it to local bottlers (R.II, 9). These distributing companies sell the Coca Cola syrup to local bottlers, such as petitioner (R.II, 122). Each bottler has a contract with a distributing company in which the bottler is given the exclusive right to bottle and distribute Coca Cola within a designated area (R.II, 119).

The contract between petitioner and Coca Cola Bottling Co. 1903, which is typical of agreements between bottlers and distributors of Coca Cola in this country, establishes a base price at which petitioner may purchase syrup, and provides for price adjustments fluctuating with the market cost of syrup ingredients (R.II, 122). The price includes a deposit, figured on a per-gallon basis, for advertising. The bottler selects such advertising media as he desires and his deposit account is charged only for such advertising as he elects to use. The bottler is not required to use any advertising if he does not so desire (R.III, 1).

The contract further provides that Coca Cola Bottling Co. 1903 shall have the right to inspect the bottler's premises for cleanliness and to make quality tests of the product (R.II, 124). The bottler is required to use the distinctive Coca Cola bottles, cap and trademark, and to purchase these supplies from an approved manufacturer (R.II, 124-125). Manufacturers of these products are not connected with The Coca Cola Company.[4]

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[4] Caps, bottles and coolers are all produced by approved manufacturers in the State of Texas, as well as by manufacturers elsewhere (R.II, 3).

The bottler agrees to obtain all of his syrup from the contracting distributor, to sell only in the designated area, and vigorously to push the sale of the beverage (R.II, 125). The distributor, in turn, agrees to furnish the bottler with all of his syrup requirements (R.II, 120).

The contract does not give to the distributor any control over the price which the bottler charges for the beverage or the amount of the deposit which he may require from the customer for the case and bottles.[5]

There is no minimum quota which the bottler must fill. The bottler need not buy any minimum amount of syrup. The contract between the bottler and distributor is not terminable by the distributor except for breach by the bottler of his contract obligation, and then only after notice and failure to correct such default within a period of thirty days (R.II, 125).

On the foregoing facts the Board found that petitioner is an integral part of the multi-state sales and distribution system employed by The Coca Cola Company, and, on this ground alone, held that petitioner "is engaged in commerce within the meaning of the Act." (R.I, 182-185). In support of its finding that petitioner was an "integral part" of the sales and distribution system of The Coca Cola Company, the Board relied entirely upon those provisions of the contract between petitioner and Coca Cola Bottling

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[5] The record shows that prices and deposit amounts charged by bottlers doing business in Texas were varied (R.I, 182).

Co. 1903, which contain "the limitation on the buying of Coca Cola syrup, the restrictions on territorial operations, the required payment for advertising, the limitation on the type of bottles and crowns to be used, and the submission to plant inspection." (R.I, 185).

II. Proceedings before the Board

Following the usual procedures under Section 10 of the Act, the Board issued a complaint (March 13, 1951) against petitioner, alleging that petitioner had violated Sections 8(a)(1)(3) and (5) of the Act. In its answer petitioner specifically denied that its operations affected commerce within the meaning of the Act (R.I, 20-21). Following the usual hearing, the Trial Examiner on November 30, ~~1950,~~ 1951 issued his Intermediate Report, finding that petitioner had committed unfair labor practices (R.I, 173-231). The evidence relied upon consisted of acts and conduct on the part of officials and supervisory employees of the petitioner (R.I, 227). There was no evidence that any officials of The Coca Cola Company, or of Coca Cola Bottling Co. 1903, participated in or were ever aware of the conduct relied on by the Board. (R.I, 217.)

The undisputed evidence showed that petitioner alone controls its labor relations policies, wages, hours and conditions of employment, and that neither The Coca Cola Company nor Coca Cola Bottling Co. 1903 has, or exercises, any control, direct or indirect, in these matters (R.III, 16-27). No of-

ficial of The Coca Cola Company or Coca Cola Bottling Co. 1903 owns any stock in petitioner, nor does any such official hold any corporate position with petitioner (R.III, 103).

Thereafter, on June 30, 1951, the Board issued its decision, substantially adopting the Trial Examiner's recommendations, and finding that petitioner had engaged in additional unfair labor practices not found by the Trial Examiner (R.I, 153). The Board entered its usual order directing petitioner to cease and desist from the unfair labor practices found and to take certain affirmative action (R.I, 167).

III. Proceedings in the court below

On June 30, 1953, the court below entered its decision in which it decreed that the Board's order be enforced. *N.L.R.B. v. American Bottling Co.*, 205 F. 2d 421. In this decision the court, *sub-silentio*, rejected petitioner's contention that petitioner was not subject to the Act. On July 22, 1953, petitioner filed in the court below a petition for rehearing, citing, *inter alia*, the decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Bill Daniels*, and *N.L.R.B. v. Gilbert Motor Sales, Inc.*, 202 F. 2d 579, and asserting that this decision was in conflict with the decision below. On Aug. 13, 1953, the court below denied the petition for rehearing without opinion.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that petitioner's business affected commerce within the meaning of the Act.

2. In granting enforcement of the Board's order.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that petitioner's activities affect interstate commerce within the meaning of the Act is in square conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Bill Daniels, Inc.*, and *National Labor Relations Board v. Gilbert Motor Sales*, 202 F. 2d 579, pending on the Government's petition for certiorari, No. 81, this Term. In the *Daniels* case, the Sixth Circuit held that a local Ford dealer who operated under an exclusive distributor arrangement with Ford Motor Company was not subject to the Act, although the dealer was "tied (by contract) with Ford into a vast national network of an integrated distribution system." Holding that "The circumstances that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact in the case" (202 F. 2d 579), the court rejected the Board's contention that interstate commerce was affected through the dealer's relations with Ford Motor Company. The court held that a distributor could properly be deemed an "integral part" of a manufacturer's distribution and sales system only if the dealer was either an agent or an employee of the manufacturer.

In the instant case, likewise, petitioner makes all of its sales and relevant purchases in Texas.* Here,

* As we have indicated above, note 2, *supra*, although petitioner makes some purchases of incidental items outside of Texas, the Board regarded these purchases as too

also, there is no claim and no showing that petitioner is either an agent or an employee of The Coca Cola Bottling Company or Coca Cola Bottling Co. 1903. Consequently, the holding of the Sixth Circuit that an exclusive distributorship arrangement does not suffice to transform a local enterprise into an operation affecting interstate commerce is squarely in conflict with the decision below.

2. This Court has recognized the importance of the question here presented, and the conflicting views of the Courts of Appeals as to its proper resolution, by granting certiorari in *Howell Chevrolet Company v. N.L.R.B.*, No. 34, this Term. The Government acquiesced in the grant of certiorari in that case, and has filed a petition for certiorari in the *Daniels* and *Gilbert* cases, supra, No. 81, this Term. In that petition the Government asserts (Pet. p. 16) that "the obviously important issue in these cases as to the jurisdiction of the Board, affecting many of the thousands of sales outlets of a major national industry (and probably affecting similar dealers in other industries as well), requires resolution by this Court."

Since, as the Governmnet correctly observes, the question to be decided in the *Howell* case will affect exclusive dealers, like petitioner, in industries other

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small to warrant assertion of jurisdiction, and predicated its commerce findings exculsively upon the theory that petitioner is a part of the multi-state sales and distribution system employed by The Coca Cola Company. In view of the Board's rationale, the Government is, of course, precluded from attempting to rely upon these incidental out-of-state purchases to support the Board's findings. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 93-95.

than the automobile industry, we believe that this Court should not restrict its consideration of the issues to relationships arising in the automobile industry, but should simultaneously consider the problem in the light of the facts contained in this record.

3. The instant case reveals the error of the Board's "integrated sales and distribution system" approach far more glaringly than does the record in *Howell*, or in *Daniels* and *Gilbert* in which the Government has applied for certiorari. In all of those cases, while the local dealers purchased their new cars and parts locally, many of the parts were originally manufactured outside of the state and merely assembled or distributed to the dealers locally. The Board relied upon the out-of-state origin of the parts in its decision in those cases (*Daniels*, 96 N.L.R.B. No. 191, *Gilbert*, 97 N.L.R.B. No. 21, *Howell*, 95 N.L.R.B. 410), and the Government's petition for certiorari in *Daniels*, No. 81, this Term, makes much of this fact. The petition argues that a work stoppage at the plant of a dealer would curtail the manufacturer's outlet for out-of-state parts and thereby interfere with the flow of commerce across state lines. (Pet. for cert., p. 17, 19-20.)

In the instant case, however, not only does petitioner purchase all of the Coca Cola syrup locally, but all of the syrup it purchases is manufactured locally, and there is no showing that any of the ingredients of the syrup originate outside the State of Texas. Consequently, there is no basis whatever for argument that a work stoppage by petitioner's employees could have any impact on the movement of articles involved in the production of Coca Cola across state lines.

Thus, the sole basis upon which the Board's assertion of jurisdiction can rest in this case is the "integration" theory urged by the Government at page 18 of its Petition in the *Daniels* case, adopted by the Court of Appeals for the Ninth Circuit in the *Howell* case, by the Court of Appeals for the First Circuit in *N.L.R.B. v. Ken Rose Motors, Inc.*, 193 F. 2d 769, and by the court below in the instant case, but rejected by the Court of Appeals for the Sixth Circuit in the *Daniels* and *Gilbert* cases.

Moreover, tested against the facts contained in this record, the "integration" theory contains flaws not readily revealed by its application in the automobile cases. In the automobile cases the "franchises" relied upon by the Board were clearly designed to enable the manufacturer to stabilize and regularize its own production and sales. In stating the "Question Presented" in the *Daniels* and *Gilbert* cases, the Government emphasized (Pet. pp. 2-3), that the dealer agreements with Ford were intended "to enable Ford to schedule its production effectively," and that "Pursuant to this agreement respondents regularly advise Ford of their anticipated needs of automobiles, parts and accessories." In the instant case, however, the arrangement between the bottling companies, the distributing companies and The Coca Cola Company are not designed or intended to facilitate scheduling of syrup production (R.II, 118-127). Bottlers order Coca Cola syrup for current use only (R.III, 41); there is no showing that they ever advise Coca Cola Bottling Co. 1903 in advance of future needs, or that Coca Cola Bottling Co. 1903 advises The Coca Cola Company of its future syrup demands.

In addition, bottlers of Coca Cola, like petitioner, unlike automobile dealers, are not restricted to trading in one product (R.III, 26-27); their contracts are not cancellable at the option of the manufacturer without cause (R.II, 118-127); the contracts do not regulate the relationship of the bottler to the public (R.II, 118-127); the bottlers are not required to maintain an approved inventory (R.II, 118-127); the bottlers select their own advertising media and pay only for such advertising as they elect to use (R.III, 1); and the bottlers are not required to report on their financial status or other business matters to the manufacturer (R.II, 118-127).

Since the issue is whether, as the Board holds, a degree of control exercised by a manufacturer or distributor over a dealer, through contract, suffices to subject the dealer to the reach of the Act, this Court should consider the validity of the Board's doctrine not only where, as in the automobile industry, the degree of control is relatively substantial, but also where, as here, the relationship between bottler, distributor and manufacturer is infinitely more tenuous.

4. To the extent that the Board and the court below relied upon the relationship between petitioner and Coca Cola Bottling Co. 1903 and The Coca Cola Company to establish that petitioner's operations affect interstate commerce, the decision below is squarely in conflict with the decision of the Court of Appeals for the Tenth Circuit in *N.L.R.B. v. Shawnee Milling Company, d/b/a Pauls Valley Milling Company*, 184 F. 2d 67 (C.A. 10). In that case the respondent, Shawnee Milling Company, operated a flour mill at Shawnee, Oklahoma, from which

products were shipped in interstate commerce. Shawnee also operated a branch plant at Paul's Valley, Oklahoma, under the trade name "Pauls Valley Milling Company." The Pauls Valley plant was operated by a local manager, subject, however, to overall supervision as to labor relations and other policies by officers of the Shawnee Company. All purchases and sales by the Pauls Valley Milling Company were made within the state of Oklahoma.

Conceding that the operations of the Pauls Valley plant did not affect interstate commerce, the Board, nevertheless, asserted jurisdiction over unfair labor practices committed there on the ground that the Pauls Valley Milling Company was "not a separate entity, but * * * merely a trade name for an integral part of (Shawnee's) business." 82 N.L.R.B. 1266, 1278, n. 6.

The Court of Appeals held, however, that because there was no showing that "a labor disturbance in the Pauls Valley plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Pauls Valley would cast undue burden upon the operations of the plant at Shawnee," the Board was without jurisdiction over the Pauls Valley operation.

If, as the Tenth Circuit holds, even direct ownership and active supervision of an intrastate operation by an interstate company does not make the intrastate operation subject to the Act, then, even more clearly, the mere existence of a contractual relationship between an intrastate enterprise and one which operates interstate does not bring the former within the scope of the Act.

The test applicable here, we submit, is the test applied by the Tenth Circuit in *Shawnee*, namely, whether a labor dispute affecting petitioner's operations would have an impact upon the movement of goods or services across state lines. Here, as in *Shawnee*, since petitioner's sales and relevant purchases are all made locally, and since the ingredients utilized by petitioner are all produced locally, labor disturbances could have only local impact.

To depart from this critical test of jurisdiction, as did the Board and the court below, is to repudiate the approach uniformly taken by this Court to jurisdictional questions arising under the National Labor Relations Act from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, to *N.L.R.B. v. Denver Bldg. and Construction Trades Council*, 341 U.S. 675, 683-685. To discard that guide would truly, in the words of this Court, "effectually obliterate the distinction between what is national and what is local." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, at page 37.

5. The principal fallacy of the Board's "integration" approach, which has now been approved explicitly by the Courts of Appeal for the First and Ninth Circuits, and *sub-silentio* by the court below in this case, lies in its departure from the standard established by Congress, namely, that an employer is subject to the Act only if *his own operations* affect interstate commerce. See Section 2(2), 8(a)(1) and 10 (a). Consequently, as the Sixth Circuit held in *Daniels* and *Gilbert*, *supra*, unless an intrastate employer is the agent or employee of an interstate concern, so that it may be held that the interstate con-

cern is actually the "employer' within the meaning of the Act, jurisdiction may not be exercised over the intrastate business. Thus, judged by the statutory standard, petitioner, whose operations clearly do not affect interstate commerce, cannot be deemed subject to the Act. And since petitioner alone, not The Coca Cola Company or Coca Cola Bottling Co. 1903, is the employer charged by the Board with unfair labor practices, the Board's order necessarily falls.

This is not to say, of course, that Congress would be powerless to reach or to regulate even purely intrastate business, such as petitioner's, if such regulation were necessary to effectuate a program of regulation of interstate concerns. See "The Shreveport Rate Cases," *Texas & Pacific Railway Co. v. United States; Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342; *Wickard v. Filburn*, 317 U.S. 111, and *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219. But Congress has not in the National Labor Relations Act declared that regulation of unfair labor practices by employers whose own activities do not affect interstate commerce is necessary to effectuate its policy of regulating the labor relations of interstate concerns. On the contrary, Congress has carefully in this statute preserved the line between what is national and what is local. It is not for the National Labor Relations Board to obliterate the line that Congress drew. *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363-364.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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SEPTEMBER 10, 1953

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*) are as follows:

DEFINITIONS

Sec. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to sections 151-163 of Title 45, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(6) The term "commerce" means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burden-

ing or obstructing commerce or the free flow of commerce.

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *